

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Western Family Foods, Inc.

Serial No. 78387061

David P. Cooper of Kolisch Hartwell, P.C. for applicant

Amos T. Matthews, Trademark Examining Attorney, Law Office
117 (Loretta C. Beck, Managing Attorney).

Before Bucher, Grendel and Taylor, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Western Family Foods, Inc. seeks registration on the
Principal Register of the mark **CARB VALUE** (*in standard
character format*) for goods identified, as amended, as
follows:

"canned fruits, frozen vegetables, canned
vegetables, tomato paste, tomato puree,
cranberry sauce, applesauce, processed
mushrooms, soups; canned and bottled
processed olives; pickles, jams, fruit and
berry preserves, marmalade, peanut butter,
maraschino cherries, pepperoncini, cocktail
onions, cheeses, cheese food, cheese spread,
instant nonfat dry milk, yogurt, fruit
flavored yogurt, margarine, non-dairy whipped
topping, non-dairy creamer, powdered mix for
making a milk-based beverage, edible oils,
vegetable shortening; frozen fresh fruits,
frozen fresh berries, meat, poultry, fried
chicken, frozen prepared meats, frozen

seafood, namely, frozen fish, potato chips, potato-based dip chips, dry mixes for soups, dried fruits and vegetables, raisins, dehydrated vegetables for use in the manufacture of food products, dehydrated potatoes and potato flakes, sweetened flaked coconut, vegetable protein bits having a bacon flavor, bacon, hot dogs and luncheon meats" in International Class 29;

"corn chips, and tortilla chips, mayonnaise, alimentary pastes, ramen noodles, rice, flour, refrigerated bread dough; cake, cookie, biscuit and pancake mixes; cake frostings, sugar, spices, salt, mustard, capers, tomato sauce, tomato catsup, pickle relish, hot dog relish, hamburger relish, dry mixes for sauces and gravies, salad dressings, tea, coffee, instant cocoa mix, breakfast cereals, honey, marshmallow creme, tortillas, chocolate chips, crackers; prepared frozen entrees consisting primarily of meat, fish, poultry, and/or vegetables, waffles, ice cream and brewer's yeast" in International Class 30; and

"soft drinks, canned fruit and vegetable juices, canned fruit nectars, frozen fruit juices and lemonade concentrate; and canned fruit juice drinks containing water" in International Class 32.¹

The Trademark Examining Attorney refused registration on the ground that the term is merely descriptive when considered in relation to applicant's identified goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§ 1052(e)(1), i.e., that the term "Carb Value" immediately

¹ Application Serial No. 78387061 was filed on 03/18/2004 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

informs potential purchasers about an important dietary feature of applicant's listed food items.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board. Applicant and the Trademark Examining Attorney have fully briefed the issues involved in this appeal.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), if it immediately conveys "knowledge of a quality, feature, function, or characteristics of the goods or services." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) [ASPIRINA is merely descriptive of analgesic product]. See also *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987) [APPLE PIE merely descriptive of potpourri mixture]; and *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single significant quality or property of the goods. *Gyulay*, 3 USPQ2d at 1009. Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. That is, when we analyze the evidence of record, we

must keep in mind that the test is not whether prospective purchasers can guess what applicant's goods are after seeing applicant's mark alone. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) [GASBADGE merely descriptive of a "gas monitoring badge"; "Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute"]. Rather, the proper test in determining whether a term is merely descriptive is to consider the applied-for mark in relation to the goods or services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have on the average purchaser encountering the goods or services in the marketplace. *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); and *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986).

Hence, the ultimate question before us is whether the term CARB VALUE conveys information about a significant feature or characteristic of applicant's goods with the immediacy and particularity required by the Trademark Act.

A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. "Whether a given mark is suggestive or merely descriptive depends on whether the mark 'immediately conveys ... knowledge of the ingredients, qualities, or characteristics of the goods ... with which it is used,' or whether 'imagination, thought, or perception is required to reach a conclusion on the nature of the goods.'" (citation omitted) *In re Gyulay*, 3 USPQ2d at 1009; *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and [*In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985)].

In arguing for registrability, applicant contends that there is clearly some doubt as to whether the term "Carb Value" is merely descriptive, and that such doubt must be resolved in favor of applicant. Specifically, applicant argues that it takes thought to understand the relationship between the term "Carb Value" and applicant's food items; that the Trademark Examining Attorney's conclusions are not supported by substantial evidence showing that the relevant purchasing public and industry use and understand the term "Carb Value" to be descriptive of applicant's goods; and that relevant case law supports applicant's position that

the term "Carb Value" is too vague to qualify as being merely descriptive of a feature of applicant's goods.

By contrast, the Trademark Examining Attorney argues that evidence from the *Lexis/Nexis*[®] computerized database and from Internet websites demonstrates that the term "Carb Value" is commonly used to describe an important dietary feature of various food items.

... gives Weight Watchers point values for many restaurant menu items. It also gives calories, fat, fiber and **carb values**. Just go to the site and click on "Restaurants." If a menu item isn't on the site, it pretty much ... ²

Those varieties which are both low-fat and low-carb, in addition to having the low point value, have a low net **carb value** in the range of three to six net carbs. And what is immediately evident from the line as a whole is the innovative and increasingly indulgent flavor variety which we have used to start the brand off.³

... Other chains, including Applebee's and T.G.I Friday's, have partnered with weight-loss groups and include Weight Watcher points or Atkins **carb values** on their menus for some entrees.⁴

... fat, protein, ash, and water are subtracted from the total gram weight of the food; the remainder is counted as carbohydrates. By this definition, the total **carb value** would include sugar alcohols and

² *The Wichita Eagle*, December 3, 2007

³ *FD (Fair Disclosure) Wire*, November 30, 2004

⁴ *Orlando Sentinel (Florida)* July 1, 2004

fiber, as well as sugar and starch, she says.⁵

Cream's a dream: Use sugar substitutes to lightly sweeten whipped cream for the least **carb values**. Dream on with a little sugar-free crême brulee mixed with the berries for the most luxurious controlled carb dessert.⁶

... Manufacturers subtract [sugar alcohols] from the total carbohydrate content to get a "net **carb**" value - a term not approved by the FDA...

... Indulging in high calorie, low carbohydrate products, regardless of their "net **carb**" value, is likely to pack on weight and excess saturated fat will increase heart disease risk too.⁷

... Choose 40 percent of your calories from carbs, 20 percent from fat and 40 percent from protein. Krug believes this macronutrient ratio, cobbled together from popular diets, offers the best of current nutritional wisdom. "The **carb value** follows the same thinking as the Zone Diet," says Krug. "The fat number is what the American Cancer Association recommends, although it is lower than the Zone's 30 percent figure. Many foods contain hidden fats, so by shooting for 20 percent on paper, you can pretty much assure yourself of staying under 30 in the real world ...⁸

... let's analyze this label. Turning to my trusty and highly recommended carb hunters' resources*, I come up with the following

⁵ *The Boston Globe*, March 17, 2004

⁶ *The Detroit News*, July 17, 2003, and *The Desert Sun* (Palm Springs, CA), August 13, 2003

⁷ *The Patriot Ledger* (Quincy, MA), March 9, 2004

⁸ *Men's Fitness*, October 1, 2002

carb values subtracting the Total Dietary Fiber (TDF) content from the Total Carbohydrate Level. Let's assume that sorbitol, a sugar ...

... whole wheat flour contains about 73 percent total carbs and 12 percent TDF, for a net **carb value** of 61 percent.

* Rye Flour- this was a light colored bread, but let's assume it was dark (i.e., low-carb) rye flour: 69 percent total carbs and 23 percent TDF, for a net **carb value** of 46 percent. Light rye flour has even more carbs.⁹

For those watching their diet, options abound. These days, low-carb suggestions (complete with **carb values**) and vegetarian alternatives round out the menu ...¹⁰

Net Carbs Defined

There is not an official government definition of Net Carb at this time. In our software programs Net Carb is defined as:

$$\text{Net Carb} = \text{Total Carbohydrate} - (\text{Dietary Fiber} + \text{Sugar Alcohol})$$

If the Dietary Fiber and/or Sugar Alcohol values are missing (unknown) from food item data, the Net Carb calculation will treat the missing value(s) like zeros. For example, if both the Dietary Fiber and Sugar Alcohol values are missing, the Net **Carb value** would be equal to the Total Carbohydrate value, which may over-represent the Net **Carb value**. It is therefore important to also look at the Dietary Fiber and Sugar Alcohol values of foods and recipes when assessing the Net **Carb value**.¹¹

Net Carbs = Total Carbohydrate minus Fiber minus Sugar Alcohol

⁹ *Stagnito 's New Products Magazine*, February 2004

¹⁰ *Columbia Dispatch* (Ohio), February 13, 2005

¹¹ <http://www.esha.com/netcarb>

If you take our Whole Almonds as an example, you have 6 grams of carbs, 4 grams of fiber, and a resulting Net **Carb value** of 2 grams (6-4).

All of the products bearing our Carb-Raider label have a net **carb value** of 10 grams or less per serving, and the majority of them have 5 grams or less.

Are Carb-Raider™ Products Different From Regular Products?

Not necessarily. For example, our almonds and other nuts are no different from the products we were selling yesterday.

We are simply promoting them for the low-**carb value** that they naturally have and trying to bring attention to the fact that much of what we do will fit with the Low-Carb Lifestyle. There is no such thing as a "Low-Carb" nut and a "Regular" nut. Because of the way that God made them, they happen to have high fiber and subsequently low net carb values. In other cases, the products have been specifically engineered to yield a low net **carb value**, such as our sugar-free and reduced sugar products. We also have a few trail mixes (like the New Almond Summit Crunch) that we have specifically designed to have fewer net carbs than before.¹²

What Are Net Carbs

The carbohydrate count given with each recipe, and pre-designed menu on www.lowcarbgyuy.com is total carb count. You are permitted on a low carb diet to use net carb count when totally [sic] your total carbs per day.

Net carbs is a term becoming more popular with low carb diets. The term is used to reflect the amount of carbohydrate that is rapidly available in any food or product. It subtracts those carbs such as fiber, glycerin, and sugar alcohols, which either are not digested or are digested but do not impact blood sugar more than negligibly. You

¹² <http://www.mountainmanevergreen.com/carb.htm>

can calculate the net **carb value** of any recipe by subtracting the grams of fiber, sugar alcohols and glycerin from the number of carbohydrate grams.

Example: 2 Tablespoons of Creamy Peanut Butter has 6g of Carbohydrate less 2g of fiber gives you a net **carb value** of 4g.

Note: It is my advice that you not neglect total calories when selecting recipes for your daily menu. Some recipes may be very low in carbs, but extremely high in fat calories. It is important to have variety in your choices. Going on an instant pudding only diet for a week would result in weight gain, although your carbohydrate count would be such that you should have lost weight.

Example: Sugar Free/Fat Free Instant Pudding made with heavy cream instead of milk only has 5 net grams of carbohydrates per serving, BUT contains 320 calories from fat.¹³

I learned from a dietician what foods are and are not high in carbohydrates. Oh, there's the problem: carbs. So, now I am on a low-carb diet and have become an exceedingly boring person. I can spout off the **carb value** of almost any food you can name. And I can tell you how much of that food to eat, before you bankrupt the carb level. The goal is for me to eat no more than 30 grams of carbs at a meal, and 15 grams at a mid-morning and mid-afternoon snack. Hey, I am liking this idea -- snacks? I never used to get those. But, wait. 30 grams - do you know how little that is?

First thing to go, almost any kind of starch. One half cup of mashed potatoes? There's your 30 grams. Now, I challenge you - can you eat ONE HALF cup and then quit? I mean, your clenched fist is a decent way to judge ONE CUP. So, half a fist of mashed potatoes. OK. How about rice? Nope - 40 grams of carbs in a cup. And on it goes - almost any form of starch - potatoes, rice,

¹³ <http://lowcarbgyuy.com/NetCarbs.html>

pasta (whimper), bread - all too high in carbs. So portions must be small.

And forget muffins and bagels. Bagels? Really high.

So what can I eat? Well, proteins in all forms. Meats, cheeses, even beans because they are high in fiber. Fiber is good; carbs are bad. I have become a food mathematician - take the **carb value** of a portion of food, subtract the fiber grams and you have roughly (no pun intended) the overall **carb value**.¹⁴

[the **emphasis above** was shown on the excerpts placed into the record by the Trademark Examining Attorney]

As evidenced in the excerpted articles from the Lexis/Nexis database and from the Internet, the term "carb value" seems to be a term-of-art. This is especially true in the wake of the peak in popularity several years ago of the Atkins Diet, South Beach Diet, and other similar low-carbohydrate diets. It is also apparent from these excerpts that substantially all low-carb dieters and most others consumers attuned to the nutritional values of foods would currently recognize that all foods have a "carb value." As seen above, the terms "net carb value" or "net carbs," in particular, reflect the portion of the non-fiber carbohydrate that is rapidly available to the body. Even in the absence of modifiers like "low" or "net" before the term "carb value," we find that the term "carb value" alone

¹⁴ <http://kgmom.blogspot.com/search?updated-max=2007-01-16T23%3A13%3A00-05%3A00&max-results=20>

immediately conveys knowledge of a feature or characteristic of the goods.

While applicant argues that the evidence does not point to other manufacturers or merchants currently using the term "carb value" in connection with food items, there is some indication that it may have been closely associated with the popular Atkins Diet.¹⁵ In any case, we find that applicant cannot appropriate for itself as a proprietary source-indicator a term of art that should be freely available to all competitors in the food and diet products industries to refer to their products. Notably, the excerpts above suggest that other manufacturers or merchants wanting to capitalize on the continuing interest in low-carb diets would likely need to use the instant term in describing their own food products. Accordingly, we find that the term "Carb Value" is merely descriptive of food items and beverages in all three classes of goods for which applicant has indicated an intention to use this term.

Decision: The refusal to register under Section 2(e)(1) of the Lanham Act is hereby affirmed.

¹⁵ See quotation above at footnote 4, from the *Orlando Sentinel (Florida)* on July 1, 2004, appearing at the very height of the low-carb craze:

"Other [restaurant] chains ... have partnered with weight-loss groups and include Weight Watcher points or Atkins **carb values** on their menus for some entrees..."